Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-1596

In the Matter of
FRANKLIN V. C. JONES and MARION JONES,
Bankrupts.

COLD CREEK LAND AND CATTLE CO.,
Petitioner,

vs.

FRANKLIN V. C. JONES and MARION JONES,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION.

Opinions Below.

The Order Confirming Sale of Real Property of the Referee in Bankruptcy was entered February 27, 1973 [Cl. Tr. 15-17].* The District Court for the Northern District of California on petition for review reversed the

*All citations to "Cl. Tr." refer to the Clerk's Transcript which is Volume I of the Transcript of Record on Appeal to the Court of Appeals. The citation "R. Tr." refers to the reporter's stenographic record of the proceedings before the Referee in Bankruptcy and District Judge which comprises Volumes II through IV of the Transcript of Record on Appeal to the Court of Appeals.

Referee and remanded for further proceedings [Cl. Tr. 118]. A motion to reconsider was denied by the District Court in a memorandum and order [Cl. Tr. 152] reprinted in Appendix "A" of the *Petition for Writ of Certiorari* herein. The opinion of the Court of Appeals for the Ninth Circuit, affirming the District Court's Orders, is unreported but is reprinted in Appendix "B" to the *Petition for Writ of Certiorari* herein.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 17, 1975. The petition for certiorari was filed on June 19, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Section 24c of the Bankruptcy Act, 11 U.S.C. §47c.

Statutes Involved.

Bankruptcy Act, Section 39c, 11 U.S.C. §67c:

> "A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within such ten-day period may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest."

Bankruptcy Act §57d, 11 U.S.C. §93d:

> "Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion . . . ."

Statement.

Petitioner was the successful bidder at a bankruptcy sale confirmed by the Referee in Bankruptcy. Respondents, who were the bankrupts,[1] timely petitioned to review the order of confirmation. District Judge Robert F. Peckham of the Northern District of California reversed the order confirming sale on July 26, 1973 [Cl. Tr. 118]. A subsequent motion to reconsider the reversal was denied by the order of the District Judge dated December 27, 1973 [Cl. Tr. 152]. The orders of the District Judge were affirmed by the Court of Appeals for the Ninth Circuit in a Memorandum Opinion dated April 17, 1975. The petition for writ of certiorari was filed June 19, 1975.

On August 18, 1972, respondents Franklin V. C. Jones and Marion Jones petitioned for a real property arrangement under Chapter XII of the Bankruptcy Act to forestall an imminent foreclosure by one secured creditor [Cl. Tr. 48-49, 51-52]. Respondents' total debts of $600,000, of which only $5,000 was unsecured, were considerably less than the value of their assets [Cl. Tr. 3, R. Tr., Nov. 9, 1973, p. 51]. These

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[1]Respondents were originally debtors under Chapter XII of the Bankruptcy Act; at the time of the sale they had been adjudicated bankrupts; they have since become debtors under Chapter XI of the Bankruptcy Act.

consisted of the following: an undivided one-half interest in 3,900 acres of coastline property in Mendocino County, California, known as the Bear Harbor Ranch; the Westport Ranch near Westport, California, comprising approximately 1,000 acres; Iverson Landing, consisting of 35 ocean-front lots 55 miles north of Fort Bragg, California; two view lots south of Carmel, California; and two and one-half million board feet of fir and redwood timber located on the properties [Cl. Tr. 10]. An appraisal made early in the case for the trustee showed the real estate to have a "market value" of $2,300,000 and a "liquidating value" of $1,380,000 [Cl. Tr. 3]. Even the secured creditor who was attempting to foreclose conceded a substantial equity in the properties, its appraisal being $745,000.

Despite the obvious excess of assets over liabilities, the debtors were given little time to effect a Chapter XII real property arrangement. They were adjudicated bankrupts by Referee in Bankruptcy Conley S. Brown within two months, on October 18, 1972, and a trustee in bankruptcy was appointed [Cl. Tr. 10].

The secured creditor pressed in the bankruptcy court for leave to foreclose by a "Petition for Reclamation"; a hearing thereon was held on December 13, 1972 [Cl. Tr. 40-41]. This matter was continued to January 18, 1973, and in the interim, on December 21, 1972, the trustee negotiated a sale of all the bankrupts' properties to petitioner's assignor (Gibson) for $971,440 [Cl. Tr. 16, 54-56]. On December 26, 1972, the trustee filed his "Petition for Sale of Real Property" in which he sought, and received from the Referee, an expedited hearing date of January 8, 1973, to consider the proposed sale [Cl. Tr. 39-42]. Although notice of a proposed sale was given to creditors

of the bankrupt estate, there was no provision for advertising it to prospective bidders [Cl. Tr. 43-44]. It took a restraining order granted by District Judge Spencer Williams on January 5, 1973, to delay the sale from January 8th until January 18th [Cl. Tr. 46].

At the hearing before the Referee on January 18, the bankrupts' counsel objected to the speed with which the sale had been scheduled and the complete failure to advertise it publicly. He was successful in obtaining a four-week continuance of the sale to February 14, 1973 [R. Tr., Jan. 18, 1973, p. 26].

During the first week of February, 1973, the trustee for the first time purported to advertise the properties for sale [R. Tr., Feb. 14, 1973, p. 5]. This took the form of an advertisement published in *The Wall Street Journal*, but in view of the magnitude of the proposed sale, the ad (reprinted in Appendix A of this Brief) can be fairly characterized as cryptic and uninformative [Cl. Tr. 13]. Nevertheless, one other prospective bidder, in addition to petitioner's assignor, did appear before the Referee on February 14th but without a deposit check. His request for a one- or two-day delay to raise the required $30,000 earnest money deposit was denied [R. Tr., Feb. 14, 1973, pp. 8-9].

Petitioner's assignor made the only non-contingent bid, a total of $971,440 less broker's commission of 7%, which was accepted [Cl. Tr. 5]. Only $800,000 of the total sales price was cash; the balance in the form of a note was to be payable to the bankrupts rather than the trustee since all creditors would be satisfied from the cash proceeds. The note, however, was to be secured by a deed of trust on only a part of the properties being sold, namely, the Bear Harbor Ranch.

The trustee's negotiated sale permitted the rest of the properties to be conveyed to the purchaser without encumbrance [Cl. Tr. 55].

The formal order confirming the sale to petitioner of all of respondents' properties was entered February 27, 1973 [Cl. Tr. 15-17]. Respondents, the bankrupts, filed a timely petition for review [Cl. Tr. 10]. At the review proceedings before District Judge Peckham, the trustee's counsel was the same attorney who had represented the secured creditor seeking leave to foreclose in this case [Cl. Tr. 95-99; R. Tr., Nov. 9, 1973, pp. 70-74]. Together with the high bidder, he argued for affirmance of the Referee. By order made July 26, 1973, the District Judge reversed the Referee's order confirming the sale on the ground that the notice of sale and the proposed sales price were both inadequate [Cl. Tr. 118-19]. He remanded the matter for further proceedings, specifying that "if the Trustee proposes to conduct another sale, said sale shall be conducted in such a manner, including sufficiency of notice and advertising exposure, as to constitute a commercially reasonable disposition of the subject property calculated to obtain the highest price obtainable for same." [Cl. Tr. 119].

On August 3, 1973, petitioner moved before the District Judge for reconsideration, which motion was not heard until November 9, 1973 [Cl. Tr. 120-21, 151]. In the meantime, the respondent bankrupts filed for relief under Chapter XI pursuant to Section 321 of the Bankruptcy Act, 11 U.S.C §721 [R. Tr., Nov. 9, 1973, pp. 54-58]. As they had anticipated, the State of California had moved forward in its announced program to acquire one of the properties in question, the

Legislature appropriating $2,000,000 on June 30, 1973, for the purchase of the Bear Harbor Ranch in which the respondents (formerly the bankrupts, now the Chapter XI debtors) own an undivided one-half interest [Assembly Bill No. 110, Ch. 129, Item 350bb, p. 109 (1973); R. Tr., Nov. 9, 1973, pp. 59-60]. On December 27, 1973, Judge Peckham denied petitioner's motion to reconsider [Cl. Tr. 152-55].

On January 17, 1974, petitioner filed a notice of appeal to the Court of Appeals for the Ninth Circuit with respect to Judge Peckham's order of July 26, 1973, reversing the confirmation of the sale, and with respect to the order of December 27, 1973, denying the motion to reconsider [Cl. Tr. 156]. The Court of Appeals affirmed the orders of the District Court in its Memorandum Opinion of April 17, 1975.

Judge Peckham's orders were not stayed pending appeal to the Ninth Circuit, and while the appeal was pending, the Referee in Bankruptcy entered an order dated November 13, 1974, confirming the sale of Bear Harbor Ranch to the State of California, for $2,000,000, of which respondents shall receive $1,000,000. An escrow has been opened between respondents and the State in connection with this sale, and the State has now deposited $1,000,000 into it. Bear Harbor Ranch represents approximately one-third of the property owned by respondents. In addition, the Referee in Bankruptcy has, by order dated May 9, 1975, confirmed the sale to the State of California of another parcel of respondents' real property, a portion of the Westport property, for the sum of $250,000. The State has also placed $250,000 into escrow in connection with this sale.

Questions Presented.

1. Whether the bankrupts (either in that capacity, or in their present status as Chapter XI debtors) are "persons aggrieved" with standing to review a referee's order which confirmed a sale of all their properties for an amount less than fair value, where the assets admittedly are sufficient on liquidation to pay all creditors in full and return a substantial surplus to the bankrupts.

2. Whether the District Judge, under the circumstances of a surplus estate, properly reversed the order confirming the sale of the bankrupts' assets, where the record showed a number of irregularities in the sale, including a grossly inadequate price, lack of appropriate notice to prospective buyers, and unusual haste in directing a liquidation.

ARGUMENT.

I

Respondents-Bankrupts, on the Facts of This Case, Are "Persons Aggrieved" With Standing to Review the Order Confirming the Sale of All Their Assets to Petitioner.

While ordinarily a bankrupt lacks the direct pecuniary interest which is requested for standing to review an order confirming the sale of his property,[2] the Court of Appeals correctly pointed out that whether one qualifies as a "person aggrieved" under Section 39c of the Bankruptcy Act is a question of fact in each case. *See* 2A COLLIER ON BANRUPTCY, ¶39.19 at 1492-93 (14th ed. rev. 1974); *In re Henry Wood Sons Co.*, 279 F. 608 (D. Mass. 1922). Usually the bankrupt has no direct financial interest in the assets since they are vested in his trustee. But where, as is conceded here, the assets will liquidate for a sum sufficient to pay fully all creditors and return a significant surplus to the bankrupt, the bankrupt has an obvious, personal pecuniary interest in a referee's order directing a sale for an inadequate price. The bankrupt's standing to appeal an order confirming a sale, in a case involving a surplus estate, is analogous to his standing to appeal an order allowing or disallowing a creditor's claim;[3]

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[2]It is not questioned that debtors in Chapter or rehabilitation cases do have sufficient personal interest in the outcome to contest and appeal orders which adversely affect them during the administration. In re Marathon Foundry & Mach. Co., 228 F.2d 594 (7th Cir. 1955), *cert. denied*, 350 U.S. 1014 (1956); In re Pramer, 131 F.2d 733 (7th Cir. 1942). Since the bankrupts herein became Chapter XI debtors before the last order below was entered, the standing issue raised by petitioner may well be moot.

[3]Petitioner apparently concedes a bankrupt's "person aggrieved" standing to review a referee's order of any kind if the

(This footnote is continued on next page)

he has such standing if he is directly affected by the disposition of the claim, such as occurs when the claim is of a non-dischargeable type which remains enforceable against him after bankruptcy, *Menick v. Hoffman,* 205 F.2d 365, 367 (9th Cir. 1953), or when the disallowance of the claim leaves a surplus in the estate for him. *In re Woodmar Realty Co.,* 241 F.2d 768, 770-71 (7th Cir. 1957); *In re Povill,* 105 F.2d 157, 159 (2d Cir. 1939); *In re Hopkins,* 15 F.2d 206 (D.R.I. 1926).

As a matter of logic, what party other than the bankrupts in the present case would care sufficiently to resist the trustee's effort to sell the properties precipitously? Certainly not the trustee, who was the moving force behind the sale, nor the prospective buyer, who wants to preserve his bargain purchase, nor the secured or unsecured creditors, all of whom will be paid in full in any event. It is only the bankrupts with an interest in the surplus who are actually "aggrieved."

Contrary to petitioner's contention [*Petition for Writ of Certiorari,* p. 11], there is no conflict between the holding of the Ninth Circuit below and the decision of the Court of Appeals for the Fifth Circuit in *Imperial Bowl of Miami, Inc. v. Roemelmeyer,* 368 F.2d 323 (5th Cir. 1966). The latter merely states the general rule that a bankrupt ordinarily does not qualify as a

bankrupt's pecuniary interest is that he is threatened by non-dischargeable debts which survive bankruptcy. The contention, however, is that the standing is limited to the review of orders dealing with allowance of creditors' claims when the bankrupt's pecuniary interest stems not from non-dischargeable debts but rather from the right to receive back a surplus estate (*Petition for Writ of Certiorari,* pp. 13-15). This attempted distinction seems to be created out of whole cloth for the purpose of the present case. It is an overly technical emphasis on a minor verbal difference between Sections 39c and 57d of the Bankruptcy Act, a difference which is unimportant to the issue at hand.

"person aggrieved," *i.e.* one who is directly and adversely affected by the order challenged.[4] The case of the admitted surplus estate is an exception to the general rule. Neither *Imperial Bowl* nor any other reported case holds that the bankrupt *never* has standing to review an order confirming sale.

II

The District Judge Correctly Reversed the Order Confirming Sale in View of the Showing of Irregularities in the Sale, Including a Grossly Inadequate Price, Lack of Appropriate Notice to Prospective Buyers, and Unusual Haste in Directing a Liquidation.

A bankruptcy court should decline to confirm a sale of the estate's assets whenever it appears that the bid price is inadequate, or a better sale could be made, or circumstances indicate that for some other reason the sale would be "unfair" to the bankrupt estate. 4A COLLIER ON BANKRUPTCY ¶70.98[17] at 1187-90 (14th ed. rev. 1975). Upon direct review of an order confirming sale, such as occurred in the present case, the District Judge should reverse if it appears that the Referee in Bankruptcy abused his discretion in confirming. 4A COLLIER ON BANKRUPTCY ¶70.98[17] at 1182 (14th ed. rev. 1975); *In re McGrath,* 226 F.2d 959 (3d Cir. 1955); *In re Stanley Engineering Corp.,* 164 F.2d 316 (3d Cir. 1947), *cert. denied,* 332 U.S. 847 (1948); *In re Hagerstown Silk Co.,* 69 F.2d 790 (4th Cir. 1934). The record in this case clearly reflects that the sales

[4]That the Fifth Circuit treated the "person aggrieved" status as a question of fact is indicated by the court's statement that: "Nothing in the Record or the Brief suggests the specifics of any other basis for the alleged grief." Imperial Bowl of Miami, Inc. v. Roemelmeyer, 368 F.2d 323, 324 (5th Cir. 1966).

price to petitioner was grossly inadequate,[5] that the notice of sale was insufficient,[6] and that for these reasons the sale was "unfair" to the estate. These facts required the setting aside of the order of confirmation on a direct review.

It is true that a much greater showing is necessary when the attempt is made to set aside a sale by collaterally attacking a confirmation order which has become final. In such circumstances, a showing that the sale is tainted by fraud or mistake is ordinarily required.[7] Once the distinction is made between the standard of

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[5]The estate's properties, as appraised on behalf of the trustee, had a total "market value" of $2,300,000; even on liquidation the estimated value of the properties was appraised at $1,380,000. The fact that the State of California has contracted to pay $1,000,000 to respondents for approximately one-third of the properties involved shows that the appraisal was not unrealistic. The only support for the Referee's confirmation order was an appraisal of the property for $745,000, produced by a trust deed holder during the course of a reclamation proceeding in which he sought leave to foreclose. But this secured party's adverse position so taints his appraisal evidence as to make it an unworthy yardstick of value for the purpose of sale of the estate's assets, 4A COLLIER ON BANKRUPTCY ¶70.96[3] at 1127 (14th ed. rev. 1975), even if it were not proved wrong by the offer of the State.

[6]With respect to the defective advertising, the District Judge observed: "I have never seen anything like this in the way of lack of notice for a sale of this magnitude." [R. Tr., Nov. 9, 1973, p. 74].

[7]"The standard for setting aside a sale [on collateral attack] is stricter than that applied in a direct attack upon a confirmation. In the latter, the governing principle is to attain the best price for the bankruptcy estate whereas in the former there is greater emphasis upon finality in judicial sales and executed contracts, unless they are 'tinged with fraud, error or similar defects which would in equity affect the validity of any private transaction.' " In re General Insecticide Co., 403 F.2d 629, 630-31 (2d Cir. 1968). *See also* 4A COLLIER ON BANKRUPTCY ¶70.98[17] at 1183 (14th ed. rev. 1975); Smith v. Juhan, 311 F.2d 670, 671-72 (10th Cir. 1962).

review applicable to a direct attack on an order of confirmation and the governing standard for a collateral attack, it becomes clear that there is no conflict in the standard applied by the court below in a direct attack case and the decisions cited by petitioner. Four of the five cases cited by petitioner as conflicting with the opinion of the court below dealt with collateral attacks on final confirmation orders.[8] The fifth merely involved a refusal by the appellate court to reverse a sale because the Referee had not abused his discretion in confirming it.[9]

III

There Is No Important Federal Question Involved.

This case involves an unusual, even rare, fact situation of a bankruptcy estate in which, in any event, concededly there will be a surplus reverting to the bankrupts. It also involves the hopefully uncommon situation of a bankruptcy sale tainted by such irregularities that an inadequate sales price resulted. Accordingly, particularly in view of the correctness of the decision below, such federal questions as are involved here are not of the general importance which invites a grant of certiorari.

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[8]Smith v. Juhan, 311 F.2d 670 (10th Cir. 1962); In re Marathon Foundry & Mach. Co., 239 F.2d 122 (7th Cir. 1956), *cert. denied*, 353 U.S. 912 (1957); In re Stanley Eng'r. Corp., 164 F.2d 316 (3d Cir. 1947); Morrison v. Burnette, 154 F. 617 (8th Cir. 1907), *appeal dismissed*, 212 U.S. 291 (1909).

[9]J. J. Sugarman Co. v. Davis, 203 F.2d 931 (10th Cir. 1953).

Conclusion.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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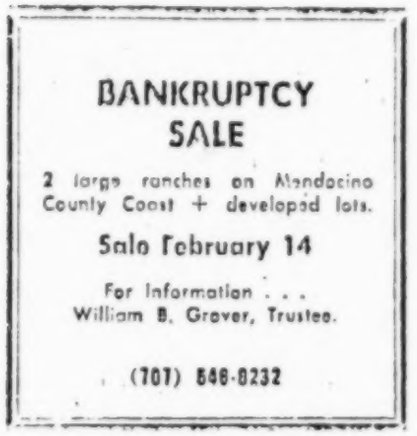
APPENDIX A.

Advertisement of Sale of Debtor's Property (Reprinted from Wall Street Journal, Pacific Edition, February 1, 1973).



[Also appearing at Cl. Tr. 13].